No. 2877.

United States Circuit Court of Appeals

For the Ninth Circuit.

H. H. RIDDELL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error.

Upon Writ of Error to the District Court of the United States for the District of Oregon.

E. B. DUFUR,

for Plaintiff in Error.

C. L. REAMES, U. S. Atty.,

for Defendant in Error.

German Publishing Co.

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ERRATA.

Page 8.

5th line, for **from** read **form.**
7th line, for **interest** read **intent.**
8th line, for **found** read **formed.**

Page 11.

113 Fed. **8**, should be **854** (2nd citation).

Page 20.

15th line should read: "then and there" the Court using the language of Mr. Bishop quoted in Blitz v. United States say p. 156.

Page 23.

3rd line for **indictment** read **inducement.**
6th line for **Supreme** read **District.**

Page 54 should be page 55.

Page 55 should be page 54.

Page 73.

8th line for **depreciates** read **deprecates.**

STATEMENT.

The Oregon Inland Development Company on October 17th, 1910, contracted with C. R. Hibberd of La Grande for the purchase of 15,000 acres of unimproved fruit lands in Union, Baker and Wallowa Counties, which it undertook to sell. The business was negotiated and managed by J. T. Conway the general manager of the company, aided by Frank Richet, president, and Hibberd. Conway worked out plans for selling this land in tracts of ten-acre units. He fixed the price at $300 for each contract, payable in instalments. Several booklets were compiled by him, descriptive of these lands and the locality. These booklets were entitled, "Fruitdale," "Famous Fruits," "Coming to Oregon," "Grande Ronde District in Oregon" and a poster, and were used by Conway as advertising matter in effecting sales of these lands. Conway and Richet also purchased a tract of land adjacent to Klamath Falls which they surveyed and platted into blocks and lots under the name "Orindale." The selling plan adopted by Conway included one of these lots with each acreage contract. A number of agents were employed to sell these contracts on commission. They were sold over a considerable extent of country. Many were disposed of to persons in the Middle West. After a time the company began making a change in the form of contract, and dropped issuing contracts for an unselected tract, with the lot,

and sold contracts for a definite tract. Conway was experiencing difficulty in arranging for selections and undertook to transfer each outstanding contract to a specified acreage tract. Many were so transferred. One hundred and seventy-eight auction contracts were outstanding when the indictments against Conway and Richet were returned. The company had title to about 2,700 acres in Union County or about 15 acres for each contract, and under the contract with Hibberd were buying additional land from time to time, and improving the holdings. The money received on the contracts was used in payment for lands, so that the acreage was constantly increasing.

Defendant during this time was acting as attorney for the company and was its secretary for a compensation of $50 per month. His entire interest in the concern was only to the extent of the compensation paid him for his work. This was mostly in examining abstracts of title to the lands which Conway was buying, and preparing such contracts and other papers as the company might require. This compensation was not paid in money, but in office rent and telephone service. Defendant rented his office from the company. The contract under which defendant performed these services is in writing and is in evidence (Exhibit AA, p. 136.) Defendant had not seen any of the lands of the company, his knowledge being confined to what he was told by Conway, Hibberd, Richet and others, all of

which was highly laudatory, and in praise of the excellent character of the lands and its suitability for fruit growing.

The Oregon Inland Development Company was formed in November, 1909. At that time John Veason was the owner of a large amount of unimproved acreage situated in various parts of Oregon. He made arrangements with Frank Richet, W. J. Byrne and W. Markillie to undertake its sale, the company being the agency through which these parties operated. They consulted Jay H. Upton, an attorney, who worked out the details of the plan for them. Defendant was employed to do certain work in effecting the corporation. He, through arrangement with Veason, subscribed for six shares for Veason, and was made a director to represent Veason's interests. Byrne managed the company until in March, 1910, when J. T. Conway, through arrangements with Veason and Richet became manager and acquired the stock that was held by Byrne. Veason, Richet and Conway arranged the distribution. This stock was not paid up in cash but was represented by a contract with Veason for the sale of 40,000 acres of his lands. The only money paid in was such as was needed for actual operating expenses. Conway, on taking charge of the company's affairs, prepared advertising literature and began the sale of these lands. About September, 1910, he discovered the unfitness of these lands for fruit raising, when be abrogated the contract with Veason.

The moneys that had been paid him were forfeited, and the whole project abandoned. An examination of the Grande Ronde District in Union County, disclosed an extensive acreage of unimproved lands with good soil and immune from late frosts, well fitted for raising fruits and for agricultural purposes, that could be purchased cheaply. C. R. Hibberd undertook to purchase these lands for and sell them to the company. A contract was executed with Hibberd on September 29, 1910, and a second one on October 17, 1910, whereupon all contracts then outstanding were taken up and new contracts issued for the lands in Union County. The whole Veason project was dropped. The price of the contracts had been $240. They were now fixed at $300, or $30 per acre, including one of the Klamath Falls lots. The six shares of stock that stood in defendant's name on the books were the property of Veason and not defendant, who had no interest outside of his work and the compensation paid him. Defendant did not at any time participate in the management of the company. He did not have a key to the office, nor the combination to the safe, nor access to the books and papers of the company. Conway managed the business, and in his absence it was managed by Mrs. Dean. She never took any orders from defendant. Defendant did not take any part in the management or operation of the company's business. He worked for the company on a salary and was not consulted about the office business. He was

informed that the lands the company was selling were good. (Record, pp. 9 to 93.) He had no personal knowledge of them.

County Judge Phy, Commissioner Galloway and 13 others of Union County's foremost citizens gave testimony as to the good character of these lands, (p. 124). The bill of exceptions makes it appear (p. 105) that the government proved that these lands were not fit for agriculture or horticulture, but this is not an accurate statement. The draft of the bill of exceptions that the Court signed was prepared by the United States attorney. Just why he saw fit to omit the names of the witnesses who testified as to his contention concerning these lands we do not know. This statement was not discovered until this brief was being prepared. It is, however, not fair to defendant, and is not the fact.

On the trial a great mass of evidence was introduced as to the representations made about the Veason property and the unsavory character of the lands for fruit culture. The introduction of this evidence over the objection of defendant is one of the questions presented. The introduction of the letter in Count Three and the documents in Counts Four and Five were objected to as not having been shown to have been mailed or caused to be mailed by defendant. Counts One and Two were abandoned at the trial.

It is also contended by defendant that the evidence of the government showing non-participation

in the transaction of the company's business entitled him to the requested instructions for acquittal.

Instructions given to the jury to the effect that if Conway or Richet caused the indictment letters to be mailed defendant was responsible from the subject of an exception as do the instructions on the question of interest, and mailing, and the refusal to charge that each count found a separate indictment and that the letter charged in such count to have been mailed could not form the basis of a verdict of guilty on either of the other counts.

The sufficiency of the indictment was challenged by a demurrer, the overruling of which is assigned as error.

SPECIFICATIONS OF ERROR AND ARGUMENT.

Assignment 1, pages 35, 4, 15, 16, 18, 19, 24, 28, of printed record.

The Court erred in overruling the demurrer of defendant to Counts 3, 4 and 5 of the indictment.

In order to set out a scheme or artifice to defraud, the indictment must allege distinctly, and not by inference or implication, every essential ingredient of a scheme adapted to defraud the persons described. Such scheme or artifice must be designed to deprive the persons mentioned of their money or property. The representations must be made with a view of, and with the intent to deprive them of

their money. Something more than a pretense or representation is required. It must be contemplated that the persons to be defrauded would act on the representations, that they would be deceived thereby, and it must appear how, and in what manner the defendant would or could obtain the money of the several persons for his personal use. An intent to damage must appear. Unless the scheme or artifice was intended by the persons devising it to damage the persons mentioned, and deprive them of something of value, it would not be a scheme or artifice to defraud. It need not have resulted in inflicting actual damage, but it must have been intended to accomplish that result; and the indictment should by apt averments directly charge such intention. If the intent to defraud is wanting, an essential element of the charge is missing, without which the pleading is a nullity and of no valid force.

In the indictment here, is no averment of any intent on the part of defendant to defraud. The prolix statements, which render the indictment voluminous, fall far short of charging any intent to defraud any one, or any intent to defraud at all. This intent is a material ingredient of the offense. It is essential to a valid indictment. This has been expressly laid down in all the cases; and in all cases where indictments under this section have been upheld the intent to defraud has been clearly and plainly alleged, as it must be by proper affirmative allegations and not by inference or implication.

8 Enc. Pl. & Pr. 862. No essential element of the offense, such as intent, can be omitted without destroying the whole indictment. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital.

United States vs. Hess 124, U. S. 486; United States vs. Carll 105, U. S. 611; United States vs. Cruikshank 92, U. S. 542, 556. A crime is made up of acts and intent, and these must be set forth in the indictment with certainty of time, place and circumstance, **U. S. vs. Cruikshank 92, U. S. 558; U. S. vs. Cook, 17 Wall, 174; U. S. vs. Harris 68, Fed 347; U. S. vs. Long 68, Fed. 348; Miller vs. U. S. 174, Fed. 35; U. S. vs. Simmons 96, U. S. 360.**

The substance of the offense is the actual or intended injury to the person sought to be reached, the fraudulently depriving him of something that he already has. Mere false and untrue representations are not sufficient in the absence of an intention on the part of defendant actually to deprive the persons mentioned of money or other thing of value. In no reported case is the mere false pretense or representation, apart from an actual intended deprivation of the person addressed of the money, held to be an offense under the section. In all these cases the intended injury to the person sought to be reachde, the fraudulently depriving him of something that he already has is deemed essential.

"If there was no intention to deprive, there cannot within the meaning of this section, be an intention to defraud; for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim as against such deceit or artifice."

Miller vs. United States, 174 Fed. 35. Fraud consists in deception, practiced in order to induce another to part with property. Intent is a material ingredient of the offense. **Durland vs. United States 161, U. S. 313; Miller vs. U. S. 133, Fed. 341; U. S. vs. Post 113, Fed. 854.** Allegations of fact which fairly show the existence of the essential element of intent is indispensable to a valid indictment. In this case as in all offenses of this character, the intention of the defendant is the very gist and substance of the fraud, which must necessarily be embodied in the scheme as a foundation for the violation of the law. The use of the word "Fraudulently," or "knowingly" is not alone a sufficient allegation of a fraudulent intent. The circumstances and declared intention must show the act to be such **U. S. vs. Post 113, Fed. 8.** Where the intent is a material ingredient of the crime it is necessary to be averred.

"In fact the gravemen of the offense consists in the evil design * * * * * * and a count which should omit the words 'with intent to defraud' would be clearly bad." **Evans vs. United States 153, U. S. 594.**

"The indictment," says Archbold, "must with certainty and precision charge the defen-

dant to have committed acts under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients in the offense be omitted, the indictment is bad. The defect will not be aided by verdict. Actual wrongful intent to deceive, or take advantage; a false representation of fact, made with knowledge of its falsity, and with the intent to induce another to act thereon is always essential." **Rudd vs. United States 173, Fed. 912; Smith Law of Fraud. Sec. 1, p. 3; 1 Bishop Cr. Law, Sec. 287, 345; (7th ed.); 1 Stark Cr. pl 177 (3d ed.)**

Mr. Bishop says: "It is a rule, universal and without exception, that every intent, like everything else which the law has made an element of the offense must be alleged." **I Bish. Crim. Proc. p. 331, (3d. ed.).**

No intent to defraud is averred in Counts 3, 4 or 5 (record pp. 15, 18, 21); nor does any intent appear in any part of Count 1, although if it did, no reference is made that will serve to carry forward any allegation of intent to defraud.

The several averments of Count 1, after emasculating the allegations having solely an application to the scheme, or enterprise, evolved in 1909 to sell the lands of John Veason, which were shown by the government's evidence to not be included within the period of limitation, nor to be any part of the scheme concerning which the indictment papers were alleged to have been mailed, consist in sub-

stance of averments of representations that the Oregon Inland Development Company was the owner of lands in Union, Baker and Wallowa Counties, and certain lots at Klamath Falls; that the lands would be sold at a certain price, payable in instalments; that literature would be issued and circulated, containing pictures that were false and untrue and a map showing certain townships in which the lands were claimed to be located, and that the lands were not mountainous nor swamp lands; that the company did not own 3,086 lots at Klamath Falls, and did not own any land in Baker or Wallowa Counties and in but six of the townships on the map in the booklet, and that the 10 and 20 acre tracts advertised in "Grande Ronde District" were not orchard lands; but were high, bleak, rough, rocky, frosty, non-arable, non-tillable and inaccessible mountainous lands, and that these facts were known to defendant.

There is no allegation of any intent on the part of the defendant to defraud; nor does the indictment point out how defendant could defraud any one. It must be remembered that the term defraud imports a conclusion only, and the facts from which the conclusion can be drawn, must be shown. It is not shown how, or by what means the defendant would or could obtain money or property by means of the representations and pretenses averred, or by means of the plan or scheme or artifice set out in the indictment. It is not alleged that the defendant bore

such relationship to the company as would put any money into his pocket that the company might receive from selling its lands. Nothing states any plan by which any person would be deprived of money and such money redound to the benefit of defendant, or that he intended to convert any money of any kind to his own use, or that he could obtain any that he could convert to his own use.

The whole material substance of the scheme as set out in the indictment consists of representations alleged to be made by defendant and Conway and Richet with reference to the lands of the company, which are averred to be false, and that defendant knew them to be false. There is an entire absence of any intent to defraud, or any showing as to how, or by what means defendant contemplated defrauding any one, or how he could defraud any one. It is not shown that he did, or could, or contemplated profiting to the extent of a dollar. The most that can be inferred is that any money that should be received for any property sold would go to the company. Defendant could not receive it. There is no allegation that the lands owned by the company were not worth the price asked. It is averred that the Klamath Falls lots were of little or no value, but the indictment is silent as to the acreage property not having a value less than the selling price asked. Much space is taken in describing pictures on the big poster and charging that they were false, fraudulent, misleading and untrue to the knowledge

of defendant. But epithets cannot take the place of averments of fact, which here are as to the character, quality and value of the acreage lands which the company were planning to sell. There can be no successful scheme of this nature unless it contains means for depriving the persons to be defrauded of something, and this must be averred. No essential part or element can be inferred or implied. **Miller vs. U. S. 174, Fed. 35.** If defendant is to be charged with devising a scheme to obtain money or property it must be shown how he could obtain the money, how he proposed to do it. This is not done. There is a total dearth of allegation as to any means by which defendant intended to, or could overreach anyone or deceitfully deprive them of anything of value. We think no case can be found where an indictment has been sustained, under this section which did not show by plain averment how it was contemplated to defraud, and how the persons charged would obtain money or property, and that they planned to convert such money to their own use. We submit that the principles of law governing cases of this kind require the averment of a complete scheme. The averments of misrepresentations with knowledge of their falsity are not enough. It must be shown that the person indicted contemplated and intended depriving some one of something of value, and that it could be done, and how it was planned to be accomplished.

It is essential to the validity of the indictment, that the names of the persons intended to be defrauded be set out or a good and true reason given for not naming them. A scheme to defraud must have for its object defrauding some person out of something of value.

The indictment should set forth the name of the person, to be defrauded, and the omission of such averment will render the indictment void. There can be no complete scheme to defraud, unless some person or class is to be defrauded. **Hendrey vs. United States 233, Fed. 8; State vs. McChesney 90, Mo. 120; State vs. Horn 93, Mo. 190; 2 Bishop Cr. Proc. Secs. 154, 195.** A scheme to defraud necessarily involves a scheme to defraud some person or persons, **Lemon vs. U. S. 164, Fed. 956.** The defendant has a right to be informed by the indictment as to who these persons are, if the grand jury has this knowledge to impart to him. If these persons are unknown to the grand jurors it will be sufficient to allege that fact, **Durland vs. U. S. 161, U. S. 306, 314;** but in no authoritative case is it said that the omission will be allowed if an untrue reason be given. The grand jury have no legal right to withhold averments of fact, going to constitute an essential element of the offense, **Larkin vs. United States 107, Fed. 697,699.** Such averments are material and must be proved as laid. **Com. vs. Manley 13, Pick 173.** If such allegations were not required it would make no difference whether it were true or false.

It is essential to set forth the names of the parties to be injured, if they are capable of definite ascertainment, unless a good reason be given for their non-specification **2 Whart Cr. Law, Sec. 1396.** The individuals intended to be defrauded should be described by name, or a good and true reason given for the omission, **Larkin vs. U. S. 107, Fed. 699; Starkie Cr. Pl. Sec. 188; U. S. vs. Simmons 96, U. S. 360.** Counts 3, 4 and 5 are each entirely without any allegation of any kind as to the persons to be defrauded; the allegation in each count being that the said defendant

> "Having devised and intending to devise a scheme and artifice to defraud, and to obtain money and property by means of false and fraudulent representations, pretenses and promises set out in the first count of this indictment to which reference is hereby made, and by which reference the said description of said scheme and artifice to defraud is hereby made a part of this count, etc."

No allegation is made as to the persons to be defrauded, nor even an inference, and unless the reference back to the first count to the description of the scheme is sufficient to include the words "Patsy Doran and divers other persons to this grand jury unknown," the counts are bad. While it is not good pleading to refer to a former count in aid of the allegations of another, **United States vs. Jolly 37, Fed. 108,111,** it is now allowable in the Federal Courts, in order to avoid repetition. But to be suffi-

cient the reference must be sufficiently full and explicit to clearly and unmistakably incorporate the matter going before with that in the count in which it is made. **Blitz vs. United States 153, U. S. 308, 317; Crain vs. United States 162, U. S. 625, 633.** This, however, is a dangerous practice; because unless care be taken, the reference may not be sufficient to make a complete statement of the offense intended to be charged, **Bartholemew vs. United States 177, Fed. 905.** The reference must be full and distinct, and clearly refer to and point out the particular matter which it is intended to incorporate in the subsequent count. The extent to which a reference may be made from one count to another is limited, **1 Bishop Cr. Proc. 431.** By all the rules of criminal pleading, where an indictment contains several counts, each count is to be treated as a separate charge and must be complete within itself, except that for some matters subsequent counts may refer to the first or former counts, and if the reference be sufficiently clear and explicit, such reference will serve to incorporate the matter referred to in the subsequent count. But if there be uncertainty or ambiguity in the reference, or if it be not clear and plain that the specific matter is brought forward by the reference, it will not aid the defects in the subsequent count. Thus where a first count set out a larceny of goods of a stated value, and the second count averred a receiving of "the goods aforesaid" the averment of value was not incorporated in the

second count. **State vs. Lyon 17, Wis. 237; State vs. McAllister 26 M. E. 374.** The leading case cited by Bishop and followed in Blitz vs. U. S. and Crain vs. U. S. is **Reg. vs. Martin 9, Carr & Payne, 215.** In this case the first count charged an assault on "Esther Ricketts, an infant above the age of 10 and under the age of 12." The second count charged an attempt, etc., on "the said Esther Ricketts," the Court held that the reference to the "said Esther Ricketts" was not sufficient to incorporate in the second count the words "above the age of 10 and under the age of 12." In **State vs. Fields 70, Kan. 391, 394** the words "the aforesaid neat cattle" were held insufficient to transfer to the second count the allegations of number, age, sex, brands and color characterizing the cattle described in the first count. In **State vs. Wade 147 Mo. 73, 76, 47 S. W. 1070,** the reference "by the means aforesaid, at the time and place aforesaid, in manner and form aforesaid," was held not sufficient, and in **State vs. Wagner 118 Mo., 626, 629,** it was held that the words "articles aforesaid" could not draw into a subsequent count the allegations of value in the former count. The court said:

> "But though time, place, or person may thus be referred to by the use of the words 'said,' 'aforesaid,' 'same,' etc., yet such manner and means of reference has its limits; it cannot supply descriptive averments which enter into the vitals of the offense **Whart Cr. Pl. & Pr. Sec. 299.**"

In Powell vs. State 42 Tex. Cr., 57 S. W. 95, it was held that the name of the defendant could not be supplied by reference to the first count. In **People vs. Smith 103, Cal. 563,** on an indictment for forgery in two counts, the reference in the second count was "the said check was the same check referred to in the first count of this information." The State contended that this was a sufficient reference to bring into the second count the averments of the first count. The court said, p. 565: "The lauguage used will bear no such construction" and held the second count void. **In State vs. Bruce 26, W. Va. 153,** the second count referred to the allegations of time and place set out in the first count by the phrase first count. The court said, p. 565: "The language of Mr. Bishop, quoted in Blitz vs. United States say, p. 156:

> "The rule is, that the reference must be so full and distinct, as in effect to incorporate the date mentioned in the first count into the second count. I think this has not been done, and that the second counts in each indictment fail to give any date to the offense charged."

In State vs. Ackerman 51 La Ann 1209, 26 So. 84, the second count referred to the first by the words "did then and there," etc. The court after quoting the rule of reference from Bishop's new Crim. Proc., Vol. 1, 420-431, say:

> "An analysis of the language of the second count fails to disclose anything which can reasonably be construed as an averment of the pur-

chase by the defendant of goods on credit or as an averment that the defendant absconded in order to cheat the seller out of the price of such goods, and without such averments no offense is charged."

Other cases to the same effect are:

State vs. Lea 41, Tenn. 175, 177; State vs. Johnson, 45 S. C., 483, 488; State vs. Burbage, 51 S. C. 284; Watson vs. People, 134, Ill., 374; Keech vs. State 15, Fla., 591; State vs. Longley, 10 Ind., 482; Jones vs. Com. 86, Va. 950.

No Federal case will be found, we think, antagonistic to the rule of the authorities cited. They are in harmony with the decisions of the Supreme Court and the text writers. In each case we have examined, where a reference has been held sufficient it has been clear, explicit and certain to the exact thing desired to be carried forward. In this case the reference to the description of the scheme and to the representations, is clear and definite as to the particular thing to be incorporated, that is "the said description of the scheme and artifice, so to defraud is hereby made a part of this count." Nothing else is referred to. The description of the scheme and the representations, pretenses and promises set out in the first count, are found beginning on page 6 of the printed record. There is not in that part of count one, which contains the description and the alleged prentenses, any averment as to the persons to be defrauded, or any averment of an intent to

defraud or any averment of any intent on the part of the defendant to convert any money or property to his own use. These are material matters which cannot be omitted without destroying the indictment. The authorities are clear to the point that an indictment to be valid must set out the names of the persons to be defrauded, or give a good and true reason for not naming them, and that an intent to defraud is essential and must be pleaded, and it is equally clear that under the rule of reference stated in Blitz vs. U. S. and Crain vs. U. S., no part of count 1, is incorporated in counts 3, 4 or 5, except that part descriptive of the scheme. Tested by these authorities the demurrer should have been sustained to counts 3, 4 and 5.

United States vs. New South Farm Company, 241, U. S. 64, illustrates the defects in the indictment here. The indictment which is stated at some length in the opinion avers plainly that the defendants were directors and stockholders of the company, and had devised a scheme to defraud certain persons named and others of their money and property, with the intent to convert the same to the use and gain of the defendants and the corporation, by offering to sell to such persons and inducing them to purchase certain 10-acre farms upon certain terms through false representations, etc., which are set out, and that defendants well knew them to be false and intended by them to deceive the persons to be defrauded and to induce such persons to part with their

money and property in the purchase of the farms. The indictment is similar in its scope to the case here and indicates the elements of intent, indictment, means of conversion, and the names of the persons to be defrauded in which the indictment here is wanting. The Supreme Court misapprehended the construction to be placed on Section 215, but they say they have no intention to control the District Court in its construction of the indictment.

ASSIGNMENTS 4 TO 18, 29, 32. RECORD PAGES 36-41, 58-86.

Coming now to the evidence concerning the Veason project. The company was formed in 1909 for the purpose of marketing the lands of John Veason, comprising approximately 40,000 acres, located in different portions of Oregon. A large number of letters, papers, pamphlets, and documents of various kinds, and also the testimony of a number of witnesses, was received that had no relevancy to the scheme charged in the indictment, and concerning which the indictment papers have relation, viz.: the plan to dispose of the property in Union County. This testimony was objected to and received over exception. The documents so received and read to the jury are numerous, and comprise assignments of error Nos. 4 to 18, as relating to the exhibits and assignment 29 as to the oral testimony of a number of witnesses who gave testimony concerning the character and quality

of certain selected portions of the land included in the Veason contract. Assignment 32 includes several exhibits having relation to these lands.

These several assignments can be grouped, as the same questions relate to their relevancy. The same objection applies that they have relation entirely to the project of John Veason, and have no connection with or relevancy to the enterprise to sell the land in Union County that was planned and developed after the Veason project had been abandoned. The indictment letters all relate to the Union County enterprise, and have no bearing on the Veason scheme, which had died and had been abrogated and abandoned more than three years before the indictment was found. From this great mass of evidence can be selected two samples that will fairly well present the general objection, that it was not admissible to prove the offense charged in the indictment, and concerning which the mails are alleged to have been used. The two copies of the publication "Success" (page 66, exhibit 13, page 73, exhibit 18, Record) and the testimony of the Forest Rangers Donnelly, Ireland, Shelley and others, as to the character and quality of certain of the Veason tracts (Record, page 93, 94). This evidence produced by the government tended to show that in November, 1909, the Oregon Inland Development Company undertook the sale of a large tract of land owned by John Veason. In October, 1910, the sale of these lands was stopped, and everything connected with

them brought to a termination. The literature which related to this Veason property was discontinued, and upon a tract of land in Union County having been contracted for with C. R. Hibberd of La Grande, all contracts that had, to that time been sold, were changed and transferred to the land in Union County. The contract with Veason was abrogated in October, 1910, and from that time everything relating to that scheme was discontinued, and at an end. The outstanding obligations of the company for contracts that it had sold were satisfied by the lands in the new project. It was with relation to this project that the letters were written, and the claim made that they were mailed. The witness Ella O'Gara for the Government testified that in November the company quit selling the Veason lands, and the pamphlet "Fruitdale," which was descriptive of the Unio n County project was sent out after the change had been made to Union County, and sale of the Veason lands discontinued (p. 77), and that the form letter with defendant's printed signature, exhibit 16, was used until October, 1910 (p. 70); that the bulletin (exhibit 24, p. 75) was mailed to each contract holder during October and November, 1910; that until the change was made to Union County the contract was on a form (exhibit 38) and after the change to Union County the form used was on blue paper, and at a price of $300.00 (exhibit 39, p. 86). Exhibit 38 related entirely to the Veason matter.

The record books, exhibits 34, 35 and 36, showed by appropriate entries that each contract had been transferred to Union County. J. T. Conway testified (p. 129) that upon executing the second contract with Hibberd October 17, 1910, for 15,000 acres in Union, Baker and Wallowa Counties, all sale of the Veason lands was stopped and all contracts that had been sold transferred to Union County; circulation of "Success" was stopped. At the time the letters mentioned in the several counts in the indictment bear date, the only project on foot by this company was the one in Union County. The Court in his charge to the jury instructed them as follows:

> "It also appears in the record undisputed that in the Fall of 1910, they ceased exploiting of the Veason lands and transferred their activities to counties in Eastern Oregon and principally in Union County. It therefore appears that all the transactions had by the company and its officers concerning the Veason lands were more than three years prior to the finding of the indictment in this case * * so that you could not, under any view that you might take of the testimony, find the defendant guilty because of his connection with the corporation during the time that it was exploiting the Veason lands, not only because such transactions are barred by the statute of limitations, but because the indictment does not allege nor charge that during that time the mails of the United States were used in the execution of the alleged fraudulent scheme. The evidence concerning the organiza-

tion of this corporation and its transactions during the time that it was exploiting the Veason lands has been admitted and is to be considered by you, in order that you may ascertain and determine the nature and character of the business in which these people were engaged, and whether or not it was a fraudulent scheme."

It is not easy to comprehend what principle of law will permit these exhibits and the oral testimony to be admitted in evidence. They were not relevant to the scheme or project for which the defendant was indicted, nor do they have any relation to the letter and documents mentioned in the indictment. They are foreign to the scheme concerning which the letters relate. It is a settled rule, that evidence of collateral acts must never be received as substantive evidence of the offense on trial. **Wharton cr. ev., Sec, 30 (10th Ed.); Boyd vs. U. S., 142 U. S. 450; Fish vs. U. S., 215 Fed. 544; Marshall vs. U. S., 197 Fed. 511; Scheinberg vs. U. S., 213 Fed. 757, 760.**

The offense for which defendant was on trial was for using the mails in the execution of a scheme to defraud in the matter of the Union County lands. The evidence relating to the Veason lands did not operate as proof to show an unsavory character of the Union County property. The indictment letters were not connected in any way with the Veason property and had no relevancy thereto. Long before the time of their dates the Veason project had been abandoned and was entirely terminated, ended and closed, and all acts looking to their advertisement

and sale discontinued. The Company was completely divorced from them and all persons to whom the Company had issued contracts, had entered into new contracts, the old ones having been taken up and superseded. The Veason lands had been repudiated because of their unfitness, and everything connected with them had been concluded. Of this there was neither question nor dispute. The fact was established by the evidence of the Government, so that the relevant query was the character and quality of the property being obtained through the agency of Hibberd in Union County, and the nature of the representations made with reference thereto, and defendants' connection with and knowledge of these lands. To detail before the jury for days the many acts and things done with reference to these Veason lands, to spread before them the extravagant statements made about them by Byrne and Conway in "Success," "Progress" and "The Land of Opportunity," and to put before them the testimony of the ten witnesses that tracts of the Veason land examined by them were all up in the high mountains, arid, rocky and all and every part thereof absolutely worthless and unfit for any agricultural or horticultural use whatsoever, could not have failed to unduly prejudice the jury adversely to the defendant. If this testimony and evidence was admissible for any purpose it was to establish the substantive offense charged in the indictment. It was offered for that express purpose, without any limitation. (State-

ment of Court and District Attorney, page 66 Record, at time of introduction of 1st edition of "Success.") No attempt was made to limit its application, when offered, and its effect on the minds of the jury was made from day to day, as this evidence was produced slowly and in voluminous detail. The partial limitation made in the charge of the Court was neither clear enough, nor sufficiently explicit to inform the jury understandingly as to this extended mass of evidence, which took days to hear. The Court told them that the transactions were barred by the statute of limitations, and that no charge was made of use of the mails concerning them; but the evidence as to these lands was admitted and was to be considered by the jury to enable them to determine "whether or not it was a fraudulent scheme." This was substantive evidence of the direct offense, and not limited to any particular element for which evidence of collateral acts is under some circumstances admissible, but as evidence to prove the actual scheme then in question before the jury. Under the circumstances of this case, it would not have been admissible in any event for any purpose. **Marshall vs. United States, 197 Fed. 511, 513.** The jury were not in any position to eliminate the effect of all this mass of evidence touching the character of the Veason lands, and the representations made by Byrne and Conway concerning them. There was so much of this that did not so explicitly mention Veason, or refer to his name that the jury were left

unadvised as to what part of it did relate to Veason and his project, and what part related to Union County. I mention as an instance, the testimony of the Forest Rangers Donnelly et al. They were each questioned as to the examination, location and quality of certain specifically described sections of land. Veason did not appear in their testimony, nothing in their testimony gave the jury to understand whether they were testifying to Veason lands or lands in the Union County project. So with "Suc cess." The flamboyant utterances which it contained, taken in large part from the publications of the several Chambers of Commerce, throughout the State, had but little in them from which the jurors could tell whether they were intended to refer to the Veason lands or the lands in Union County. Some of the Veason tracts were in Union County and confusion was easy. In fact the Veason tracts that Conway examined and which caused the abandonment of the Veason project and the repudiation of the contract with Veason for the purchase of his lands, were located in Union County and not a great distance from some of the lands owned by the company near Elgin. No admonition was made by the Court at the time of the introduction of this evidence, that its purpose was limited, and it was not until after the jury had listened to this testimony for days, and it had been argued before them by the United States attorney and its full effect and import as evidence of the substantive offense impressed upon

them, and with the full and complete understanding and belief on the part of the jurors, that this evidence was proof of the offense for which defendant was on trial, that the limitation was made by the Court, but in so brief and general a way that it is very doubtful if any of the jurors understood what the limitation meant. Then, too, the documentary evidence was sent to the jury room for the use of the jury when they retired, and they were at liberty to give it as much consideration as they desired. It is extremely doubtful if they thought of these pamphlets and photographs and other papers as being limited in their application, but gave them full consideration, and were unduly influenced by them in reaching their verdict to the substantial prejudice of the defendant.

III.

Assignment 13. (Record Pages 38-70.)

The witness, Ella O'Gara, testified to a circular letter prepared so that all that was necessary was to fill in the address, date and amounts when it would be ready to mail. The signature to this form letter was the stamped signature of Mr. Riddell. She was then asked:

Q. Well, are the signatures true and correct representations of the signature of Mr. Riddell?

A. Just like he writes.

The question was objected to, and a motion made to strike the answer out on the ground that it did not

appear whether defendant had authorized the use of the stamp or other device. The Court overruled the objection and remarked: "I don't think a man can assume the duties of the office of secretary, and allow the literature to go out with his name signed to it without some inference being drawn against him. I don't know just what. It is at least for the jury to pass upon."

An exception was duly saved. It is urged on the Court's attention that the objection to the question and the remarks of the Court were well taken. It was surely proper for the defendant to require that authority for the use of the name be shown. This was not attempted, and nothing to the fact that when the use of this stamp came to the knowledge of defendant he objected to its use and demanded its return (record page 128.) The whole matter depended on the authorization or lack of authority of defendant to the use of his printed signature. It was not a question as to its similarity to his signature, but of his acquiescence in its use. The letter was offered in evidence, over objection and exception (exhibit 16, pages 71, 72 of the record) without any proof having been made that defendant authorized its use. It was offered for the purpose of proving fraud. (Statement of U. S. Att'y, page 71) and to be useful for this purpose the sanction, or acquiescence in its use, or his authority for its use were essential. Without these its admission was error. It was made more prejudicial by show-

ing that letters with the stamped signature of defendant impressed on them were sent through the mails. The jury were looking for evidence of use of the mails, and seeing these printed letters coming before them with proof that they had been transmitted through the mails they were the more readily inclined to belief in the guilt of defendant, notwithstanding that more than three years had elapsed before the indictment was found and the enterprise concerning which the letters were used had been abandoned; and they had no relevancy to the scheme concerning which the indictment letters were written. The jury were influenced adversely to the defendant by the remarks of the Court, which were not impartial, to say the least. Whether designedly or not they created an atmosphere sufficient to impress the jury with the belief that the defendant was guilty because letters bearing his stamped signature were prepared and mailed by Miss O'Gara. The jurors are quick to take impressions from the trial judge, who is easily able to instil into their minds a feeling of hostility to the defendant that evidence will not overcome. **Starr vs. U. S., 153 U. S. 626; Sandals vs. United States, 213 Fed. 569, 576.**

IV.

Assignment 28. (Exhibits 41 and 42.) (Pages 89-90 Record.)

The witness, Fannie Dean, was asked on direct examination by the United States attorney concern-

ing the clearance certificates set out in counts 4 and 5 of the indictment:

Q. Now taking up the first one, No. 557, it is in favor of a Mr. E. H. Bryant of Gallup, New Mexico, and the one 554 is in favor of J. K. Hartline, Albuquerque, New Mexico. Through what agency would that be transmitted to these gentlemen residing in those places?

A. These clearance receipts were first prepared by me and then taken to Mr. Richet and Mr. Riddell for their respective signatures. After Mr. Richet had signed had signed them and after Mr. Riddell had signed them, they would then be mailed by the witness.

The question was objected to and an exception saved.

Counsel was no doubt making an endeavor to prove the mailing of these documents by trying to show a custom; but it was not sufficient to show custom by testimony limited to these two papers alone. We do not see why, if it was a custom of doing business that he was trying to establish in order to reason out a probability of these papers being mailed from a long course of dealing or action with reference to many other papers of this kind, why he did not frame his question so as to include a course of dealing over time sufficient to establish a custom. But this cannot be shown by testimony limited to these two particular papers. The reason why evidence of a custom is allowed is to infer the probab-

ility of an act being done in a particular way from many other acts of a similar kind extending over a long period of time having been done in that way. This testimony was not elicited for that purpose. No course of dealing was proved, and the testimony was not pertinent to the fact of the mailing. It did not establish the facts. The witness afterward testified that these papers were given to Conway after they were signed (record p. 92.) The question through what agency these two specific documents would be transmitted to these gentlemen was not a proper question, nor framed to draw a competent answer.

V.

Assignments 20, 21, 22, 23, 24. Pages 78, 79, 80, 81, 82 record.

The line of evidence including the pamphlet "Fruitdale," exhibit 28, "Famous Fruits," exhibit 29," "Coming to Oregon," exhibit 30, "Grande Ronde District in Oregon," exhibit 31. The large poster, exhibit 32, went to the jury over the objection and exception of defendant.

These pamphlets and booklets, were issued by the Oregon Inland Development Company in advertising the Union County lands. The objection to them is based on the fact that it was not proved that the defendant knew that any of the statements and representations made in them were false, and for the reason that it was not shown that defendant

prepared or assisted in preparing any of this literature. This literature was prepared by Conway.

The witness, Ella O'Gara, testified as to the knowledge of defendant of part of this literature, and as to his having seen several of the different pamphlets, no one, however, went so far as to testify to defendant's knowledge of the contents of any of it, or that defendant had any knowledge of any untrue statements or misrepresentations of fact that might have been inserted in these booklets. No one testified that defendant did anything in the way of preparing material for these pamphlets, or that he obtained the photographs for the poster or knew them to be misleading or untrue. The most that was testified to connect defendant with it was the statement of Ella O'Gara, who said (p. 82):

"Mr. Riddell knew we were getting out the big poster and he saw it on the wall and he saw it after it was published, and he was very enthusiastic about it. He said this poster ought to get the business if anything would."

This falls considerably short of fixing defendant's responsibility for the publication. It does not tend to indicate a knowledge of any misrepresentation on the part of defendant. It does not show any knowledge by him that the pictures on the poster were untrue, and did not conform to the labels. It all failed to indicate a guilty knowledge necessary to implicate him for the publication of any of this literature.

Here is where the prosecution is weak. They failed all through the case to show that defendant had any knowledge of the lands advertised as would render him morally culpable for any misstatements that may appear in any of these publications. It is this knowledge that will make him responsible; without it there is no evidence of bad faith, which is essential to the government's case, simply knowledge that the publications were issued and used for advertising purposes is not enough to permit their admission in evidence. There must be evidence that defendant knew the lands, or knew the untruth of the literature, something that would directly connect him with the fraud and show a fraudulent intent in him. The government's case must rest on evidence more potent than a mere possibility. There must be positive proof.

In particular so far as exhibit 29 the pamphlet entitled "Famous Fruits" is concerned, the evidence was to the effect that this publication was prepared by Conway, and not submitted to defendant (p. 78 record). This paper was received in evidence without proof of knowledge of it by defendant, much less knowledge of any untruth as to the statements which it contained. The government's evidence showed that defendant was not responsible for this publication. The effect of this book on the jury was heightened by the Court's remarks that, "It was gotten out by the general manager of the firm, a man employed by or whom Mr. Riddle assisted in employing ac-

cording to the contract, and if in the proper scope of the employment I suppose some responsibility attaches to the employer and I think is competent." (p. 79.)

The contract referred to (exhibit 27) was a contract between the company and Conway, providing for the duties and compensation of Conway. It was signed on behalf of the corporation by the president, F. Richet, and attested by defendant as secretary. It was not defendant's personal act, nor did it result from any agreement made by defendant. Conway and Richet owned the stock, and managed the business. It was an agreement reached between them; the agreement was attested by defendant in his capacity as secretary. It was certainly incorrect, prejudicial to defendant and out of accord with established principles of law for the Court to admit this paper which was admittedly not known to defendant, and to heighten and increase its prejudicial effect on the jury by the remarks which gave them to understand that defendant was Conway's employer that Conway was merely an employe, and that defendant was criminally responsible for the delicts of Conway. This was all untrue and without basis of fact or law to support it.

Any eulogistic matter as to the property mentioned that may have been untrue or of such nature as to unduly impress the jury must have had a prejudicial effect. This publication was not competent tested by any rule that requires knowledge of its

publication on the part of defendant. It was incompetent tested by any rule that requires knowledge of the falsity of its statements to be shown by the prosecution. No rule of evidence of which we are advised will sanction its admission.

While the government was offering evidence relating to the publication entitled "Famous Fruits," prepared and used by Conway, the Court remarked in the hearing of the jury, "It (meaning the publication) was gotten out by the general manager of the firm, a man **employed by or whom Mr. Riddell assisted in employing,** according to the contract, (complainant's exhibit 27) and if in the proper scope of the employment I suppose **some responsibility attaches to the employer** and I think is competent. But the evidence in this case up to this time indicates that this concern was organized for a purpose the government claims is fraudulent, and that was the object and purpose they had in view. Mr. Riddell was one of the organizers, director and secretary of the concern signed the contract to put a man in charge to carry out the purposes of the organization, and if it was such as the government claims and I don't think a man can do that and then escape responsibility, even criminal, if the evidence sustains that theory. That is a question for the jury of course." (Record p. 79.)

It is not true that when one who as secretary of a corporation signs a document that it is his personal act. The defendant did not employ Conway. The

act of signing the contract as secretary was a ministerial act in which he had no personal interest. It was necessary to become a valid contract of the corporation, that it should be attested by the signature of the secretary. It was signed because it was an agreement that had been made by Conway and Richet as the ones interested in the business, and to evidence a formal contract between Conway and the company. It was misleading to the jury to tell them that the act of defendant appending his signature to the contract as secretary, made Conway an employe of defendant, and to say that Conway was a man employed by defendant, and if in the proper scope of the employment some responsibility attaches to the employer * * * "and I don't think a man can do that and then escape responsibility even criminal."

The contracts of a corporation are generally signed with the corporate name, by the president or some general officer other than the secretary. The secretary has very limited powers. His duties are clerical; he has no general power to make contracts. He is limited to the duty of affixing the seal and attesting it by his signature. The corporation acts through its president or other head and through him executes its agreements. The secretary stands in the light of an attesting witness. **Williams vs. Harris, 198 Ill. 501; 64 N. E. 988.**

It was error and prejudicial for the Court to impress the jury with the belief that defendant was

the employer of Conway, and criminally responsible for all of Conway's acts. The jury carried this wrong belief with them throughout the trial, and into the jury room. The influence of the trial judge on the jury is at all times of great weight. His lightest word or intimation is received as a direction and is generally controlling. Remarks that state an erroneous rule of law, or which tend to create a feeling against the accused have the tendency to prevent a fair trial, and are improper.

Starr vs. U. S. 153, U. S. 626; Hicks vs. U. S. 150, U. S. 452; Sandals vs. U. S. 213, Fed. 569, 576; Rudd vs. United States 173, Fed. 912, 914; Lemon vs. United States 164, Fed. 961; Hickory vs. United States 160, U. S. 424; Smith vs. United States 161, U. S. 89, 90; Mullen vs. United States 106, Fed. 892-896.

VI.

Assignments 33, 34 and 35, Record pages 42,, 109-115.

Objection was made to the admission in evidence of the letter set out in count 3 and the certificates in counts 4 and 5, and to the instruction of the Court that it was not necessary that the letter be of a nature to be effective in carrying out the scheme, but that it was enough if the papers were designed for the purpose of executing the scheme or to assist in carrying it into effect, although in the opinion of the jury they might have been wholly insufficient for that purpose and that the letters or documents

were intended by the parties mailing them in execution of the scheme. (Record pages 43, 159.)

The letter set out in count 3 was not proved to have been connected with the defendant, and was not relevant to the scheme described in the indictment, and was consequently not admissible. Keeping in view the allegations of the indictment as to the so-called auction contracts, and the fact that the scheme outlined in the indictment as developed included those who held contracts for one of the tracts and a lot at Klamath Falls, and the statutory requirement that the mailing denounced is of a letter mailed for the purpose of executing the scheme, it must be, in the absence of direct evidence of intent by defendant, that unless the letter on its face showed that it could have been instrumental in executing the scheme set out that it would not be admissible.

The letter in count 3 does not relate to the consummation of the plan set out in count 1. Its plain terms indicate the contrary. An inspection will show that it is a proposal for the sale of a specified ten-acre tract, and an offer to the addressee to exchange his contract for a specified piece of acreage. The letter mentions the enclosure of plats of 32 ten-acre tracts. This was merely an offer to trade him a piece of land for his contract, and let him inspect the land before he made the exchange.

The letter must be adapted to the execution of the scheme set out in the indictment and have such

relation thereto as will give it some applicability to the scheme. The scheme or artifice in the execution of which this letter was claimed to have been mailed, must have been something which could have been furthered by the sending of the letter. **Hendrey vs. United States 233 Fed. 9, 11; Stewart vs. U. S. 119 Fed. 95; U. S. vs. Kenofskey 235, Fed. 1019.** The addressee of the letter testified as to its receipt, and that he did not elect to transfer his contract to a particular piece of acreage, although according to the terms of the letter he had an opportunity to do so. The letter shows on its face that it could not have been in execution of the scheme, it was merely a proposition to exchange the contract for something else not set out or included in the terms of the indictment. The very broad rule stated in **Durland vs. United States 161, U. S. 315** that it is enough if, having devised a scheme to defraud the defendant, with a view of executing it, deposits in the post-office letters which **he thinks** may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor, must in all reason be limited to letters having some relation to the scheme planned and described in the indictment. The letter must be capable of being effective, particularly in the absence of any mailing by defendant, or any knowledge by him of the writing of the letter, or of its existence, or of any intention on his part to execute the scheme described. In the absence of any thought on the part of defendant as

to the purpose of the letter, it should be such an one as is reasonably adapted to aid in executing the scheme outlined in the indictment. We think that so far as this letter is concerned, it is entirely inapplicable to the scheme described in the indictment, and was not such as could be effective in carrying the alleged scheme into execution.

In the Durland case the Supreme Court put a limit on letters that may be admitted to support an indictment. It must be a letter which the **defendant thinks** may assist in carrying the scheme into effect. It is not every letter that will suffice to support a charge. There is no evidence that the defendant had any thought, or design of any kind as to this letter. He could not, as he was ignorant of it. No construction that the letter will bear can bring it within the scope of the indictment, so as to make it in any way effective in carrying the scheme or plan there set out into execution. The rule in the Durland case requires knowledge on the part of the defendant of the mailing, otherwise he could not come within it by thinking that the letter will serve to aid in the execution of the plan.

Then, too, there is no evidence that the defendant caused it to be mailed. Its existence was unknown to him. He was ignorant that it was mailed. There is no evidence that he planned or set in motion any forces that led to the mailing of this letter, nothing to show that he approved of it, no conscious participation in its deposit in the postoffice.

The verb **cause** means to produce, to compel. It is that which produces a result; that from which anything proceeds, and without which it would not exist, **State vs. Dougherty, 4 Ore. 203; Ins. Co. vs. Pacific Union Club 169 Fed. 776.** To cause is to turn the balance; to bring about that condition which determines the final result. It calls for an act of the will, a conscious act. In legal contemplation a letter was caused to be mailed by one, if by his **authorization,** or with his **knowledge** and **acquiescence,** it was done by B in the execution of their joint enterprise. **Burton vs. United States 142 Fed. 62.** An act cannot therefore be said to be caused by one, unless he brought it about, unless he authorized it, or unless it was done by another at his direction, or in the execution of their joint enterprise with his knowledge and acquiescence. These definitions and their practical application all call for knowledge, at least the exercise of some conscious act looking to the mailing and an acquiescence in the deposit in the postoffice. In **Samuels vs. United States 232 Fed. 540, 541,** the Court say:

> "In order to constitute the offense charged the defendant must have either deposited these letters in the postoffice to be carried through the mails to the parties to whom they were addressed, or caused it to be done, **knowing** that they were for the purpose of carrying into effect the scheme to defraud charged in the indictment."

The same objection as to insufficient proof of mailing by defendant applies to the clearance certi-

ficates set out in counts 4 and 5. There is not even a scintilla of evidence as to any mailing by defendant or of any act of his being a cause for their being placed in the mails. They were admitted under the theory that defendant was responsible for the acts of Conway and Richet, and that if either of these caused them to be mailed defendant was chargeable. This, we think is not the law. There must be some conscious act of the defendant which propelled them toward the mails. There is an absence of any testimony to show this. The only evidence is that of the addressees, who testified to their receipt by mail. Mrs. Dean testified that the receipts were signed by defendant at her request and given by her to Conway. She was not certain whether the letter in count 3 was mailed to Hayward (p. 92, record). The clearance receipts were taken by Conway to the office of the Northern Trust Company for registration and left there. Riddell did not know what disposition was made of them. The Hayward letter was not shown to defendant who did not know that it was mailed (Record p. 130). This is all the evidence as to the mailing. All the testimony on this point has been preserved (record page 147). It will be seen that there is no evidence to connect defendant with the mailing of either of these documents, nothing to show his knowledge of their existence, nothing to establish him as a cause for their having been mailed, nothing to bring the mailing within the purview of the principle of proximate cause as used in

Demolli vs. United States, and their admission in evidence was error.

The exhibit 119, is further objectionable as not being either the original or a proved copy. In the absence of the original before secondary evidence of its contents is admissible a copy must be proved. Hayward simply stated that he could not say what he did with the original letter, because he could not find it in his office when he left, and they had a fire in the building where his office was located and a number of his papers were lost. But he states he forwarded the letter to the United States attorney at Portland. So it was not burned. The original should have been produced, an unproved copy was not admissible.

VII.

Assignments of Error 45, 46, 47; Record pages 46, 174.

The indictment charges that the defendant did place and **cause to be placed** in the postoffice for mailing and delivery, a letter, etc. (pp. 16, 19, 21 Record.)

All the evidence as to the mailing of the indictment papers has been incorporated in the bill of exceptions (record p. 147), by the evidence of the government it appears undisputed that the defendant did not mail either of the three documents, or direct their mailing. There is no direct evidence of mailing. The whole proof on this score is reduced to an inference, from the fact that the

respective addressees received the several documents from the postoffice. So that if defendant is to be held, it must be because of some implication of law that makes him criminally responsible for the acts of others performed without his knowledge or acquiescence, and an implication that he thereby caused the three documents to be mailed. The indictment must stand, if at all, on the allegation that he caused the letters to be mailed, no mailing by defendant having been proved.

The rule as to a sufficient allegation in an indictment of causing an inhibited act to be done is stated in **Simmons vs. United States 96 U. S. 360, 362,** and is that a charge that defendant caused a thing to be done must give the name of the person whom he caused to perform the act, or if such person's name was unknown to the grand jury it should have been so stated. The principle of law applied in this case is applicable here. There the indictment was for a violation of section 3266 R. S., which makes it punishable for any one to cause certain prohibited acts to be done. The indictment charged that the defendant "did knowingly and unlawfully cause and procure to be used a still," etc. The Supreme Court, after stating the rules of law for determining the sufficiency of indictments say, page 362:

> "Tested by these rules, the second count is insufficient. Since the defendant was not charged with using the still, boiler and other vessels himself, but only with causing and pro-

curing some one else to use them, the name of that person should have been given. It was neither impracticable, nor unreasonably difficult to have done so. If the name of such person was unknown to the grand jurors, that fact should have been stated in the indictment."

The charge that the defendant himself did the mailing is perhaps sufficiently direct to hold if there was any evidence on which such charge could be substantiated. There being no evidence even tending to show any mailing by defendant, nor personal knowledge on his part of such mailing, nor anything from which an inference of mailing by him can be drawn, there is a variance between the pleading and proof. The verdict must stand on the charge that he caused the letters to be mailed, and under the rule stated by the Supreme Court in the Simmons case the indictment is fatally defective in that respect. This entitled the defendant at least to the instructions to acquit (Assignments 45, 46 and 47, pp. 46, 174 of the record.) The rule as stated above has never been departed from. It was applied in **United States vs. Hess 124 U. S. 483, 488** as governing an indictment for using the mails in aid of a scheme to defraud, and it has since been followed and applied, as a settled rule of procedure, by the Federal Courts in cases under Secs. 5480 R. S. and 215 of the Penal Code.

These requests should have been given for yet another reason. The evidence of the government

(pages 91, 92, 93 record) is to the effect that defendant did not take any part in the management or operation of the company's business, that defendant worked for the company on a salary and was not consulted about the office business; that the entire management of the business of the company was directed by Conway; that Conway, Richet, Hibberd, the agents and everybody who had knowledge of these lands were loud in their praise; that defendant received this information. Defendant did not have access to the books or papers of the company. No orders were given by defendant. He knew nothing about the records or books of the company and did not have the combination to the safe, or a key to the office of the company; all the books were kept in the safe. When Conway was out of town Mrs. Dean was in charge of the office. Defendant signed the clearance receipts as secretary when they were presented to him, and sometimes he signed them in blank. Defendant had nothing to do with the correspondence. The government in putting forth this testimony established the non-participation of defendant, in the transaction of the business of the corporation. A party is not allowed to deny the credibility of its witness. This evidence of defendant's not having any part in the direction of the business, and his belief that the lands being sold were good lands frees him from complicity in the scheme, and explains away all that might be inferred from the fact that he was secretary and signed the

checks, clearance receipts and other papers that required the secretary's signature.

VIII.

Assignments 43, 44. Pages 161, 162 record.

The Court in charging the jury instructed them as to the element of intent to defraud in the following language. (Record pp. 161, 162.):

The law presumes that every man intends the natural and probable consequences of his own unlawful acts. Wrongful or unlawful acts when knowingly or intentionally committed cannot be justified nor excused on the ground of innocent intent. An intent to injure or defraud is presumed when an unlawful act which results in loss or injury is proved to have been knowingly committed. If, therefore, you find from the evidence and beyond a reasonable doubt that there was a scheme and artifice to defraud substantially as set out in the indictment, and that the defendant Riddell was a party thereto, that the representations contained in the literature of the company were made with his knowledge, and that these representations were known by him to be false, then the intent to injure and to defraud the auction contract holders of the Oregon Inland Development Company may be by you presumed. Acts which involve such consequences when knowingly and wrongfully committed establish not only a guilty intent to injure and defraud but they disclose moral turpitude utterly inconsistent with an innocent in-

tent. It is presumed that every sane person intends the natural and ordinary consequences of his own voluntary act. Applying this rule to the case at bar, if you should find from the evidence and beyond a reasonable doubt that the defendant was a party to the scheme and artifice to defraud set out in the indictment, if you should find that there was such a scheme or artifice, and that in the execution of such scheme or attempting so to do, he mailed or caused to be mailed the letter set forth in count 3 of the indictment, and the circulars set out in counts 4 and 5 of the indictment, then he would have violated the statute and your verdict should be accordingly.

The instructions quoted were error, because they eliminated the question of intent from the consideration of the jury, and told them that if they found the defendant was a party to the scheme and artifice set out in the indictment and caused the mailing of the indictment letters he should be convicted regardless of whether or not he intended to do anything to injure or defraud any one. The instruction had the effect of making the presumption of intent a conclusive one, and forbade the jury making any finding on this essential element of the case.

The instruction went much further than to shift the burden of proof from the government to the defendant. It settled the question of intent conclusively as against the defendant, if it should be found that he was a party to the scheme. He may have

been a party to the scheme, believing in the good faith of those who were managing and controlling the affairs of the company, and in the good quality of the lands that were being disposed of. His belief in the integrity of the scheme may have been absolute, and yet the jury were not permitted to consider his good faith or honest belief, if they simply found that he was a party to the scheme set out in the indictment.

The intent to defraud is a material ingredient of the offense denounced in section 215 of the Penal Code. It is a fact to be submitted to and found by the jury. "The significant fact is the **intent and purpose.**" **Durland vs. U. S., 161 U. S. 313.** "There must be the underlying **intent** to defraud." **Harrison vs. U.S., 200 Fed. 665.** "The **intention** of the defendant to defraud is an essential element of the offense." **Miller vs. U. S. 133, Fed. 342.** The defendant was entitled to have the issue as to his good faith submitted to the jury to the same extent as the other material elements of the offense with which he was charged. The burden was upon the government to prove the intent of the defendant to defraud beyond a reasonable doubt. This was a matter of proof to be submitted to the jury for their determination, and not a presumption of law to be conclusively settled by the Court, and the jury instructed that it was altogether matter of law, and not a question that required consideration by them.

In Coffin vs. United States 156 U. S. 432, 445 the Trial Court charged the jury, p. 445:

> That when the prohibited acts are knowingly and intentionally done, and their natural and legitimate consequence are to produce injury to the bank, or to benefit the wrongdoer, the intent to injure, deceive, or defraud is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful and their acts legitimate."

The Supreme Court held this instruction error, saying, p. 461:

> "In addition, we think the 22d exception to the rulings of the Court well taken. The error contained in the charge, which said substantially that the burden of proof had shifted under the circumstances of the case, and that therefore it was incumbent on the accused to show the lawfulness of their acts was not merely verbal, but was fundamental."

In **Hibbard vs. United States 172 Fed. 66, 71,** the indictment was for using the mails in the execution of a scheme to defraud. The trial judge charged the jury as follows:

> "The law presumes that every man intends the natural, legitimate and necessary consequence of his acts. Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud may be presumed upon an unlawful act which results in loss or injury, if proved to have been knowingly committed."

The Court told the jury in this instruction that the intent to defraud was established, conclusively presumed, when he said: "Acts which involve such consequences when knowingly and wrongfully committed **establish,** not only a guilty intent to injure and defraud, but they disclose moral turpitude utterly inconsistent with an innocent intent." This is much more than a disputable presumption; it is a conclusive determination. To establish is to fix unalterably; to settle firmly and permanently what was before uncertain; **Century Dict., Webster; 11 Am. and Eng. Enc. Law, 2d ed. 353; Eberhardt vs. Sanger 51 Wis. 78; Eagan vs. Finney 42, Ore. 599; Smith vs. Forrest 49, N. H. 230.** Thus to establish a guilty intent is to fix it unalterably, to settle it firmly and permanently. The Court took it upon himself to find that element of fact, and to instruct the jury that the presumption of intent that would arise would be conclusive and beyond discussion. It made no difference what evidence of good faith and innocent intent might have appeared in the course of the trial, it all went to no purpose in the face of this strange and startling instruction. Cases of this nature involving a violation of this law, have without exception been reversed whenever an instruction making the presumption of guilty intent conclusive was given. Indeed whenever an instruction in a criminal case which had the effect to shift the burden of proof to the defendant as to any element was given, the Appellate Courts have without exception reversed the judgments.

The Court of Appeals, speaking through Circuit Judge Seaman, after citing the general rule of presumption stated in Greenleaf, that a sane man is presumed to contemplate the natural and probable consequences of his own acts proceeds to say:

> "Of course no such rule is applicable to the case at bar; and it appears from other instructions submitting the issue of intent to determination by the jury from all the evidence, that the Court intended no such conclusive effect to be understood from the above mentioned instruction. Nevertheless, the unqualified terms so stated as a presumption of law, are erroneous and their liability to mislead the jury is undoubted, irrespective of the contention on behalf of the plaintiff in error that no presumption of specific intent to defraud—which is the statutory offense charged in the indictment—arises from the fact that the fraud may appear to be the natural consequence of the act committed. The distinction between presumptions of law and mere inferences of fact is not observed in this instruction; and assuming it to be a disputable presumption of law (1 Greenleaf Ev. 33) its effect must be to cast the burden upon the accused to disprove fraudulent intent, which is unauthorized. * * * The intent may rightly be inferred from the circumstances in evidence, but it is an inference of fact, not a presumption of law."

In the case of **McKnight vs. United States 115 Fed 972** the trial judge gave the jury the following instruction:

"The presumption is that a person intends the natural and probable consequence of his acts intentionally done, and that an unlawful act implies an unlawful intent. The law presumes that every person intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed."

Judge, now Justice Day, in commenting on this instruction, said:

"This method of making proof of intent to defraud, as necessarily flowing from acts whose legitimate tendency is to defraud does not absolve the prosecution from the requirement of showing intent, when that it is an essential element of the crime, by the rule of evidence which requires proof in criminal cases to be sufficiently certain as to exclude reasonable doubt of guilt. If the burden of proof shifted to the defendant when the prosecution has introduced testimony from which the jury, in the absence of other proof, may infer the presence of guilty purpose or intent—especially if the defendant was required to establish this want of intent beyond a reasonable doubt—the accused may be convicted when the proof leaves in the minds of the jurors a reasonable doubt of his guilt as to an essential element of the crime * * * * the burden of proving evil intent, where an essential ele-

ment of the crime, is with the prosecution, and does not shift to the accused. * * * The intent to defraud was a vital element of the case to be made out by the United States."

In **Chaffee vs. United States 18 Wall 516, 545,** the Court instructed the jury that it was a rule, without exception, that where a party has proof in his power which if produced, would render material facts certain, the law presumes against him if he omits to produce it. The Supreme Court say:

"The purport of this was to tell the jury that although the defendant must be proved guilty beyond a reasonable doubt, yet if the government had made out a prima facie case against them, not one free from all doubt, but one which disclosed circumstance requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of law that full proof which which should dispel all reasonable doubt. In other words the Court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty and the duty thereupon developed upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. * * * * The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury and converted what at law was intended for their protection—the right to refuse to testi-

fy—into the machinery for their sure destruction."

In **Cummins vs. United States 232 Fed 844** the trial judge charged the jury in the following language:

"The law presumes that every person intends to do that which is the natural result of his actions. * * * Every person under the law is held responsible for what, as a reasonable man he must have known would be the result of his act."

The Court say:

"In a case like this in which a specific intent accompanying the act is a necessary element of the offense charged, the presumption is not conclusive, but is probatory in character. * * * Of course a jury in the absence of other evidence would be authorized to infer the intent from the character and natural consequence of the act; but even then the ultimate finding is for the jury, not the Court. * * * * If the Court might properly have instructed the jury that the evidence was legally conclusive against him, it could as well have directed a verdict of guilty in so many words."

"A defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. If the judge may decide that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty." **Konda vs. United States 166 Fed. 93.**

In **Melton vs. United tSates 120 Fed. 504**, the Court charged the jury that if they found certain facts as to the indictment letter having been written at Gadsden, Ala., by one of the defendants, and having relation to the scheme to defraud, and that it was found on the desk of the defendant Clark, they might presume that the letter was placed, or caused to be placed in the postoffice by defendants, or one of them, unless there be other circumstances or evidence which removes such presumption. This was held error, that the charge tended to deprive defendants of the presumption of innocence. The Court say:

> "The important inquiry was whether or not the defendants posted the letters at Gadsden. From proof of certain facts the Court said the jury were authorized to find that they did so post them unless there was other evidence favorable to defendants which removes such presumption. This is in effect, to instruct the jury that the proof of certain facts showed defendants guilty of the act in question, and shifted the burden of proof to the defendants to remove the presumption," and was error.

In **Chambliss vs. United States, 218 Fed. 157**, the jury were instructed that where liquor illegally introduced into the Indian Country was found in the possession of the defendant, the jury would be warranted in returning a verdict of guilty, unless there was some explanation which the jury finds consistent with his innocence. This was held error as shifting the burden to the defendant.

"The burden of proof is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. **Davis vs. U. S., 160 U. S. 487.**

In **People vs. Baker, 96 N. Y. 340, 350,** the trial judge charged in the following language:

"If you find that the defendant made the representations charged in the indictment, and that they were false, and the defendant knew they were false when he made them, then the law presumes the fraudulent intent."

The Court of Appeals in holding the instruction error said:

"The crime of false pretenses is not made out by simply showing that the representations charged in the indictment were made, and that they were false, and that the defendant knew them to be false. The jury from those facts and from all the other facts may infer a fraudulent intent; but the law does not presume a fraudulent intent; that is to be found as a fact by the jury, and is not an inference of law."

Post vs. U. S. 135 Fed. 1, 10; Potter vs. U. S. 155, U. S. 438; Black vs. State 18 Tex. App. 124, 129; Lura vs. State 12 Tex. App. 257, 259; State vs. Maynard 9 Pac. 514 Nev.; State vs. Luff 74 Atl. 1079; German vs. U. S. 120 Fed. 666 (C. C. A.); Hicks vs. U.

S. 150 U. S. 449; People vs. Flack 123 N. Y. 324; Stokes vs. People 53 N. Y. 164, 179; People vs. Martin 33 App. Div 284; State vs. Hatcher 29, Ore. 309, 320.

In each of the several cases cited, the erroneous instruction was far less conclusive and binding on the jury than the charge complained of here. The jury are given far greater latitude when told, as in Coffin vs. U. S. that the intent to defraud is sufficiently established to cast on the defendant the burden of showing that their purpose was lawful and their acts legitimate, than in the case at bar where told that such acts **establish** not only a guilty intent to injure and defraud, but they disclose moral turpitude utterly inconsistent with an innocent intent. In the one case the acts knowingly and intentionally done sufficiently established the intent to cast the burden of disproving them on the defendant; while here the instruction established the intent, that is fixed it unalterably, and made the presumption conclusive. The Court, not content with instructing the jury that the presumption of a guilty intent was conclusive, emphatically impressed on the minds of the jurors the final nature of the presumption by adding "but they disclose moral turpitude utterly inconsistent with an innocent intent." The plain import of this language is obvious, and goes to an extent not hinted at in any of the cases cited. The Court in the instruction went on to charge the jury that:

"It is presumed that every sane person intends the natural and ordinary consequence of his own voluntary act. Applying this rule to the case at bar, if you should find from the evidence, and beyond a reasonable doubt, that the defendant was a party to the scheme and artifice to defraud set out in the indictment, if you should find that there was such a scheme or artifice, and that in the execution of said scheme or attempting so to do, he mailed or caused to be mailed the letter set forth in count 3 of the indictment, and the circulars set out in counts 4 and 5 of the indictment, then he would have violated the statute and your verdict should be accordingly."

This quotation is the last paragraph of the instruction as to intent and directly follows the conclusive instruction given above. The rule of presumptions stated in the beginning of this last quoted part of the instruction follows the rule as to evidence stated by Greenleaf. This rule has been held inapplicable to an instruction in cases under this statute. **Hibbard vs. United States 172 Fed. 66, 71**; where it is said: "Of course no such rule is applicable."

This instruction that the Court gave as to the presumption of intent, indicates instantly the conclusive nature of the charge, and required the jury to return a verdict of guilty if they should find that the defendant was a party to the scheme or artifice set out in the indictment, and that he mailed or

caused one of the indictment letters to be mailed, thus eliminating entirely from the consideration of the jury the vital element of intent, which all the books and authorities rule must be submitted to the jury as a vital and substantial part of the case and which the jury are required to find beyond a reasonable doubt.

IX.

Assignments 39, 49, 50, 51, pages 43, 159, 186 Record.

Defendant saved an exception to the following instruction given to the jury:

> "It is enough if, having devised a scheme to defraud, the defendant with a view to executing it, deposited or caused to be deposited in the postoffice, letters or papers which were designed for the purpose of carrying it into effect, although in the judgment of the jury they may be wholly insufficient for that purpose; nor is it necessary for the government to prove the mailing of all of the letters set out in the indictment and to which I have called your attention. It is sufficient if it has satisfied you that one or more of such letters was mailed by the defendant or caused to be mailed by him, and that such letter or document was in fact intended by the parties mailing it in the execution of or to assist in the execution of the alleged unlawful scheme."

This instruction is objectionable in that by it the Court told the jury that they might convict if they should find that the defendant caused the mailing

of but one of the indictment letters. Each count in the indictment is a separate charge. It is a separate indictment, and must stand or fall on its own proof. Each letter deposited is a separate offense **In Re Henry 123 U. S. 373.** The charge was in three counts. To warrant a verdict of guilty on any one of these counts the jury must necessarily find that the specific letter or document set out in such count was in fact mailed by defendant, or through his instrumentality. He could not be convicted of the charge in count 3, because he caused the mailing of the paper described in count 4, nor could he be justly convicted under counts 4 and 5 on proof of the mailing of the letter in count 3. It seems too clear to require more than the bare statement, that defendant could not be convicted of the offense charged in any one count on proof of mailing anything other than the letter or paper charged in such count. This instruction, however, gave the jury to understand that defendant could be convicted on all three counts on proof being made that he mailed any one of the three documents charged. This is not in conformity with the law.

In a subsequent part of the charge (p. 160) this instruction was repeated, and it is found again in the instruction forming assignment of error 40. The direction that all that was necessary was a finding as to the mailing of one letter to authorize a conviction, on all three counts is repeated on pages 133, 155 and 166. Nowhere in the instructions to the

jury is there any explanation that each count is a separate charge of a distinct offense, or that each count is a separate indictment, or that the defendant could not be convicted of the charge in one count by proof of the mailing of the letter described in another count. By this instruction the door was opened wide for the jury to pronounce a verdict of guilty on all three counts on proof of the mailing of any one of the documents set out.

Defendant requested the Court to expressly instruct the jury as to each separate count, and that the mailing of any one of such documents should be limited to the count which charged its mailing. These requests which the Court denied are as follows, (pages 179, 180.):

> "The jury is instructed that the defendant cannot be found guilty under the third count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain letter of date June 26th, 1911, signed Oregon Inland Development Company, J. T. Conway, Vice-President and General Manager, addressed to W. C. Hayward, Manila, Iowa, which letter is set forth in the third count of the indictment."
>
> "The jury is instructed that the defendant cannot be found guilty under the fourth count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate dated June 9th, 1911, in favor of E. H. Bryant of Gallup, New Mexico, which

certificate is set forth in the fourth count of the indictment."

"The jury is instructed that the defendant cannot be found guilty under the fifth count in the indictment unless the jury shall find that the defendant mailed, or caused to be mailed, a certain certificate of date May 29th, 1911, in favor of J. K. Hartline of Albuquerque, New Mexico, which certificate is set forth in the fifth count of the indictment."

These requests were refused, nor was their substance covered in any part of the general charge; but instead, the misleading and erroneous instruction was given that it was only necessary to find the mailing of but one of the indictment papers to warrant a verdict of guilty, without any explanation as to the effect of the several counts, or what a count included, and required.

These requests should have been given, and the jury instructed that a finding as to the mailing of any one of the three documents would not justify a verdict of guilty on any count other than the one charging that specific paper. The Court failed to state that each count was a distinct charge of the commission of a substantive offense, complete in itself, and was not to be confounded with either of the other counts. Each count must be substantiated by its own proof and considered and passed on separately. It is not in accord with the principles of law to blend three accusations together so that the jury can find an accused guilty of three separate

crimes if they have evidence of the commission of one only. It can lead to three convictions and three punishments for one infraction of the law and is not to be tolerated.

This instruction departs from the broad rule of **Durland vs. U. S.** as to the letters mailed being for the purpose of executing the scheme set out. That rule limited the letters to such as the **defendant thinks** may assist in carrying the scheme into effect. This instruction enlarged appreciably on that rule, by saying "letters or papers which **were designed**" for that purpose; and again it is stated, "It is sufficient * * * that such letter or document was in fact intended **by the parties mailing it** in the execution of" the scheme. The instruction does not say that the defendant must have thought each document would assist to execute the scheme, nor that defendant intended or purposed them to be in execution thereof, but enlarged the rule to place the design that such letter should be for that purpose to some one else than the defendant, and that the intent might be that of the **parties** mailing the letter, and not of the defendant.

X.

Assignments 38, 40. Record pages 42, 44, 158, 160, 185. 187.

The Court in charging the jury said, (p. 158):

> "If, therefore, you believe from the testimony in this case that there was an unlawful

and illegal device or scheme to defraud by means of false and fraudulent representations set out in the indictment, entered into between the defendant and Conway and Richet, or either of them, and that such scheme contemplated the use of the United States mails in its accomplishment, then it can make no difference, as far as the defendant's guilt is concerned, which one of the co-conspirators mailed the letters charged in the indictment, if they were mailed at all, or whether he knew that they were mailed, or whether he had any knowledge of the contents thereof, if in fact they were mailed by one of the conspirators, or associates in furtherance of the unlawful scheme or device to defraud to which the defendant Riddell was a party, and of which he had knowledge. * * * * * * You must, therefore, before you can find the defendant guilty be satisfied beyond a reasonable doubt, as I shall attempt to define that term to you hereafter, that he devised or assisted in devising such scheme to defraud, and that he or **his co-conspirators** placed or **or caused to be placed** in the postoffice of the United States for mailing and delivery, one or more of the three letters or documents mentioned in the indictment, and to which I have called your special attention, for the purpose of executing such scheme."

It is submitted that the Court erred in giving these instructions to the jury. By them the jury were told that the defendant was responsible for any act of either Conway or Richet; and also that if Conway and Richet had devised the scheme, it could

make no difference so far as the defendant's guilt was concerned, which one mailed the letters, or whether defendant knew they were mailed, or had any knowledge of the contents thereof, and further that he should be convicted if one of the co-conspirators caused the letters to be mailed.

Under Section 215 Cr. Code, the offense consists in mailing the letter. If the letter is not mailed there can be no crime.

A conspiracy to be criminal must be to commit an offense against the laws of the United States. The conspiracy must be to mail the letter in the execution of a scheme to defraud. **Salla vs. U. S. 104 Fed. 544; U. S. vs. Clark 121 Fed. 190, 191.**

Defendant cannot be held responsible for the act of either Conway or Richet unknown to him, in the absence of a conspiracy to mail the letter adverted to. Can defendant be convicted for a conspiracy without being indicted for conspiring? If it be claimed that there was a conspiracy in devising the scheme set out in the indictment, can it be said that the conspiracy went to the mailing of the letters set out? There is no such averment. It is charged that defendant with his associates devised the scheme, but that the defendant alone caused the letters to be mailed.

The Court charged that it was sufficient to convict if Richet or Conway caused the letters to be mailed. It is very remote from the statute to say

that the accused is chargeable because some one else caused the letters to be mailed, when the law demands that the defendant himself must have caused the mailing. He and no one else must have been the active moving cause. Nothing more remote can possibly satisfy the law. It cannot be sufficient to base a conviction on a mailing caused by Conway or Richet and not by defendant. Will it do to say that defendant must answer for what Conway or Richet caused to be done; or that he is responsible for the act of either Conway or Richet in mailing a letter in execution of a scheme devised by Conway and Richet in which defendant had no part? That is getting a long distance away from both the letter and the spirit of the law.

It is obviously going far beyond the bounds of reasonable intendment for the Court to say in effect that defendant was guilty if his co-conspirators caused to be placed in the postoffice for mailing and delivery one or more of the three letters or documents mentioned in the indictment. It is a substantial departure from the requirements of the law.

It does not appear that a conspiracy existed. It was not claimed at the trial, nor referred to in the evidence. No testimony was offered for the purpose of establishing a conspiracy. The Court assumed the existence of a conspiracy when he told the jury that it could make no difference, so far as defendant's guilt was concerned which one of the co-conspirators did the mailing, and that it was sufficient

if a co-conspirator caused one or more of the letters or documents to be mailed. He did not tell the jury that they must find the existence of a conspiracy as a fact but assumed its existence. This was error.

State vs. Hatcher 29 Ore. 309, 320; Dolan vs. United States 123 Fed. 54.

The Court in another part of the charge, reiterated the statement that the defendant need not have caused the letters to be mailed, to be liable when he said: "The question is * * * did he, or one of his co-conspirators place, or cause to be placed in the United States mail, or any station thereof for mailing and delivery, one or more of the letters described in the indictment for the purpose of executing or attempting to execute such scheme." (Record p. 159).

There is no case to be found in which the responsibility of a defendant is carried so far beyond the plain meaning of the Statute, as is attempted here in these instructions. The farthest that any Court has gone in fixing responsibility for placing articles in the mails is **Demolli vs. U. S. 144 Fed. 363,** in which the writer of a scurrillious article, who had it published in a newspaper, was held. The Court, however, laid great stress upon the actual knowledge of the defendant, holding that the evidence was sufficient to show that the defendant **"knowingly caused** the objectionable matter to be put in the mails." The whole argument of the opinion, in an endeavor

to justify its conclusion, is based on the actual knowledge of the defendant, and attempts the application of the doctrine of proximate cause, which was borrowed from the law of negligence for the occasion: "In the line of causation his act is a proximate cause of the objectionable matter being put in the mail." The dissenting opinion of Judge Hook is much better reasoned and is sounder logic. He deprecates the attempt to inject the doctrine of proximate cause into the criminal law.

In Burton vs. United States 142 Fed. 62, it was held that the defendant caused the letter to be mailed if by his authorization, knowledge and acquiescence it was done. **In Rumble vs. U. S. 143 Fed. 781,** it was objected that it was not shown that the defendant knew of the letter being written or sent. The Court said this objection would have been good if it was sustained by the facts. In the late case of **Hendrey vs. United States 233 Fed. 5, 7,** the matter mailed was a bank statement which the defendant caused to be published in a newspaper, copies of which were regularly sent to subscribers through the mails. The question as to the mailing was not raised at the trial, and the Court of Appeals took care to say that the mailing would be assumed, without intending to be decided; that the Court saw no occasion to look into the question which defendant had neglected to raise. **In U. S. vs. Kenofskey 235 Fed. 1019** the defendant was charged with having devised a scheme to defraud an insurance company and using the mails in execu-

tion thereof. Pursuant to the scheme he handed certain false papers to the local superintendent at New Orleans to be forwarded by mail to the home office in Richmond. The defendant knew the documents would be sent by mail and intended that they should be. The Court in disposing of the contention that he should be held for the mailing said: "He is sought to be held on the theory that as he knew the claim would be mailed to the home office in the usual course of the business for approval before payment, he knowingly caused it to be deposited. This theory is too far fetched to be tenable."

In Samuels vs. U. S. 232 Fed. 540 it is said that the defendant must have caused the mailing knowing that it was for the purpose of executing the scheme.

No case, we believe, can be found that goes to the extreme length of holding that an accused can be said to have caused the mailing of a letter in the absence of knowledge that such letter was mailed, or of some direction on his part leading to the mailing of the particular letter. It would seem to be an anomaly to say that a person can be guilty of a crime that is committed without his knowledge, or without his having done some act to commit it. Crime is a personal thing. It is not unknowingly committed. Under Section 215 the offense is mailing the letter or other paper. One must then obviously do some conscious act which operates as a cause to place the particular document in the postoffice. The accused, under the plain terms of the statute must

either place the letter in the postoffice, or cause it to be placed there to be sent or delivered by the postoffice establishment. The intent to have the letter or document sent or delivered by the postal service is clear. It is personal to the person committing the act. It is impossible to comprehend how one could cause a document to be placed in the postoffice, and have an intent that such paper or letter be sent or delivered to an addressee, unless he did some conscious act to bring about the deposit in the postoffice of the particular letter which forms the subject matter of the charge. A penal statute such as this, is to be given a strict construction. A person charged with its violation should not be construed guilty. He should have the benefit of all reasonable intendments of construction, and not be compelled to meet such niceties of refinement in construing the act, as are necessary to hold that he is responsible for what a third person may do to cause a letter to be written and mailed.

If this instruction is to be held proper and as a statement of the law, why is it not just as logical and consonant with reason to say that one yet another degree removed from the accused may cause a letter to be mailed and the defendant be responsible, and so on to the nth degree. If it should be sufficient to say that his co-conspirators caused one or more of the letters to be placed in the postoffice, and he be responsible, there is no place where a halt can be

made, when the cause of the mailing is once away from the defendant.

The Trial Court went still farther afield and beyond the bounds of the statute when he said (p. 159): "It is sufficient * * * * that such letter or document was in fact **intended by the parties mailing it** in execution or to assist in the execution of the alleged unlawful scheme."

It is clearly shown that defendant did not participate in the mailing of any of the indictment papers. If they were mailed at all, it was by some one else. Defendant did not know that they were deposited in the postoffice. The plain terms of the statute are, that the accused must mail the papers or cause them to be mailed for the purpose of executing or attempting to execute the scheme. This intention and purpose is personal to the defendant. To say that such intention can rest in another than the defendant, and the defendant be criminally liable is unthinkable. In all the cases decided under this statute it is nowhere said that the intent that the document mailed is for the execution of the scheme, can be the intent of any person other than the accused. No line of sound reasoning can place such intent or purpose away from the person of the accused.

It must be plain that, under this charge, the defendant could be convicted without any knowledge of the contents of the letters, or any knowledge that they were mailed, and without having mailed them, and without having caused them to be mailed, and

without any intent or purpose on his part that the letters were mailed for the purpose of executing the scheme. The letters might have been mailed by some one entirely outside the influence of the defendant, and the purpose of executing the scheme be personal to such person who did cause the mailing, and not to the defendant. This is, we think, going much further than the law contemplates.

XI.

Assignment 36. Government's Exhibit 122. Record Page 122.

During the cross-examination of C. R. Hibberd, a witness for defendant counsel for the prosecution produced a letter which the witness admitted having written. It was offered in evidence and received over the objection and exception of defendant.

The Court erred in admitting the letter. It was not competent evidence against defendant. It was not written to him, and he is not connected with it so as to be bound in any particular by its contents. It does not appear to have been answered and is merely an ex parte statement of one whose remarks made in a communication to Conway and not communicated to defendant cannot conclude defendant in the least. A similar communication was held improperly admitted in **Lemon vs. U. S. 164 Fed. 959**; and in **Parker vs. U. S. 106 Fed. 906, 910.** The evidence being affirmative matter produced during

cross-examination and not within the scope of his direct examination was not admissible.

Harrold vs. Oklahoma 196 Fed. 52; Railroad Co. vs. Stimpson 14 Pet. 448, 461; Houghton vs. Jones 1 Wall 702, 706; McBride vs. U. S. 101 Fed. 824! Montgomery vs. Aetna Life Ins. Co. 97 Fed. 916; Ill. Cent. Ry. Co. vs. Nelson 212 Fed. 52; Balliet vs. United States 129 Fed. 696, (concurring opinion of Judge Sanborn.)

XII.

Assignment 37. Exhibits 128-A and 128-B.

During the cross-examination of the witness Conway, counsel for the government produced a letter written to the witness by Ethel M. Brodhagen, dated July 27, 1910, and a carbon copy of the answer written by Conway. These letters were received in evidence over the objection and exception of defendant.

It is submittd that these letters were not competent evidence against defendant. Nothing was adduced to show any responsibility for them, or that he had any knowledge of or concerning them. If defendant is to be bound in any way by statements contained in letters it must first be shown that defendant had something to do with the answer. He must have written it, or consulted with Conway and advised writing the letter, or in some way have been connected with it. Without any connection with defendant it is inadmissible as against him.

The letters were written while the company was engaged on the Veason enterprise, and has no relation to the Union County project. It is inadmissible as having no relevancy to the matters concerning which the indictment letters were written. All that has been said about "Success" and the testimony of the rangers, is applicable to these letters.

It is not permissible for a written exhibit not related to the direct examination to be proved and offered in evidence by a party to a controversy during the cross-examination of an adverse witness. By doing so counsel for the government made Conway his witness and vouched for his credibility.

If the cross-examiner would investigate the subject covered by the letters, by the testimony of the witness he must make him his own witness and stand sponsor for the truth of his testimony. The rule has long been settled in the Federal Courts that the cross-examination of a witness must be limited to the matters stated in his direct examination. **Harrold vs. Oklahoma 169 Fed. 52,** and cases cited under assignment 36.

XIII.

Assignment 58. Pages 51, 184.

Defendant requested the Court to instruct the jury that:

> "If the defendant believed the representations of the Oregon Inland Development Com-

pany with reference to the value of its lands to be true, he is entitled to an acquittal."

The Court refused this instruction and it is submitted that the refusal was error.

It was not shown by any evidence that the defendant had actual knowledge of the lands which were being advertised and sold by the company. The only evidence in this particular given was to the effect that he believed the lands to be what they were represented. Mrs. Dean testified for the government (p. 93), that the entire management of the business of the company was directed by Conway; that she thought the lands that the company was selling were good. She was told that they were. Mr. Riddell received the same information that she did, that Conway, Richet, Hibberd, the agents and everybody who had knowledge of the lands were loud in their praise.

Markillie testified (p. 63) Riddell knew nothing concerning the Veason lands except what information he got from either Veason or the witness.

C. R. Hibberd testified (p. 119) "Riddell understood that the lands were all first-class lands, suitable for fruit raising. He was told so by myself, Conway, Richet and others and had every reason for believing that the lands were as good as represented." Conway testified (p. 129), Riddell was told by Conway, Richet and Hibberd that the Union County lands were good fruit lands. He had no

knowledge of them other than what he got from us." Defendant testified (p. 137): "I always believed that the lands in Union County were all that they were represented to be. I was told by Conway, Richet, Hibbard, J. T. Phy, T. O. Bird, J. D. Slater of La Grande, and others, that these lands were excellent in quality and well situated for fruit raising.

A number of affidavits were shown me signed by a number of the leading citizens of Union County in which these lands were stated to be good fruit lands. I never saw a tract of the land that the company purchased or had under contract. My entire knowledge came from what others said. I relied entirely on the integrity of Mr. Richet. I understood that Mr. Hibberd was a business man of excellent standing in Union County, and that any lands he might purchase would be good for the purpose. Mr. Phy, the present County Judge of Union County, said that Mr. Hibberd was an excellent judge of lands, and that he was reliable. I had no reason to suspect that these lands were other than what they were represented to be."

No evidence was presented to the contrary, or to show that defendant had any personal knowledge of these lands, or that he believed them to be other than they were represented in the literature that the company put out. Good faith in the project is a good defense. **Harrison vs. United States 200 Fed. 665.** It is thoroughly well settled law that an honest intention, a belief in the integrity of the scheme is

an absolute defense. In the instant case, the whole framework of the government's contention is based on false and untruthful representations and statements made in the descriptive literature that was issued by the company, and the charge made in the indictment that defendant knew these representations to be false. If these allegations were not proved the government's case falls like a house of cards. If they failed to bring forward proof of this knowledge on the part of defendant he is entitled to a directed verdict. If there was evidence in the record showing defendant's want of knowledge of the lands, his reliance on others and his belief he was entitled to have the jury instructed that a verdict of not guilty should be returned if the defendant believed the representations made by the company as to its lands were true. These representations were the whole thing as to the scheme.

It is a maxim of the law as old as the common law that a party vouches for the credibility of any witness he produces, and is bound by the evidence brought out by his witness. Mrs. Dean, the government's witness testified concerning the belief of defendant in the good quality of these lands. This testimony must be accepted as correct. It refuted any knowledge on the part of defendant that the Union County lands were not suited for the purpose, and was evidence that defendant was not knowingly making false representations, when Conway issued the literature concerning the Grande Ronde Valley.

All the evidence as to the literature is that it was prepared by Conway. There is no evidence that the defendant prepared any of it, or that he knew the untruth of anything stated in it.

There is evidence produced by the government to the effect that he had no personal knowledge of these Union County lands, and believed them good. Based on this evidence, and also that offered by defendant, the Court was requested to instruct the jury. (Pages 50, 183):

> "In order to be entitled to a conviction based on the literature circulated by the Oregon Inland Development Company, the government must show that the defendant caused this literature to be circulated, knowing that the statements contained in it, or some of them, were false in fact and that he did this with intent to deceive and to induce those receiving the literature to part with their money or property. The government must further prove that such misrepresentations were material."

This request was refused, and its substance was not covered by the general charge, nor is it stated in the general charge that the defendant must have a knowledge that the lands advertised by the company were misrepresented. It was surely a matter of material moment that the defendant should have a knowledge that the property he is charged with misrepresenting was different from the representations made. The testimony of Mrs. Dean is persuasive that defendant's belief was honest, and that

he was unacquainted with the lands, relying entirely on others, from whom information as to their excellent quality came. The lack of evidence in the government's case that defendant knew the lands were poor, and unfit, coupled with positive testimony by the prosecution that the information conveyed to defendant was that the lands were splendid in quality and well within the representations, should entitle defendant to the instructed verdict asked for. It should at any rate require the Court to instruct the jury that the defendant must have had knowledge that the lands were illy suited for horticulture, and knowing such to be the fact, made the representations with intent to deceive.

Owing to the large number of exhibits that were admitted over objection, we have endeavored to group them as far as possible to save lengthy discussion. It is trusted that this brief presents the several questions to the Court fairly well, and it is submitted that upon due consideration the judgment of the District Court should be reversed.

E. B. DUFUR,
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H. H. RIDDELL,
Plaintiff in Error.